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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

[redacted]

WILLIAM JACKSON, JR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF FOR THE PETITIONER IN REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR CERTIORARI

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ARGUMENT

The argument of the Respondent as to whether the Air Force should have been required to retain Petitioner in the service after his conviction by the Oklahoma district court because of some contractual relationship is irrelevant. Petitioner has not contended that this was required.[1]

What Petitioner has contended is that the Air Force was under an obligation to reinstate him upon reversal and vacation of conviction by the Court of Criminal Appeals of Oklahoma when he was discharged pursuant to a regulation which authorized discharge only for that one reason—criminal conviction by a civil court.

[1] Although Petitioner does not contend that there is a contractual relationship requiring completion of enlistment, it is strange that Respondent would rely as its only judicial authority on a 1908 opinion which has the following language, obviously long since modified by this Honorable Court, pertaining to the character of discharges:

> "The exact method of this soldier's discharge and the quantum or kind of character that should be given him, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine, while that a discharge with a very bad character is not a punishment to the man discharged . . . is settled . . ." *Reid* v. *U.S.*, 161 F. 469 (S.D., N.Y., 1908)

Respondent also seems to be arguing that the Air Force *could* have proceeded in some other manner pursuant to some other regulation to discharge Petitioner with an honorable discharge. While possibly the Respondent *could* have proceeded in such a manner (although Petitioner's record was unblemished), the fact is that it did not so proceed, but instead elected to proceed under AFR 39-22. The thrust of Petitioner's argument is that, notwithstanding the fact that AFR 39-22 did not then provide for the contingency of a reversal on appeal and indicated a policy of immediate discharge of the serviceman upon conviction, the Air Force was obligated to reinstate him upon vacation of this conviction by an appellant court.

The fact that the Respondent has now, at this late date, seen the unfairness of its action toward the Petitioner and will now accord him an honorable discharge does not detract from the ultimate issue in the case—whether the Air Force was under an obligation to reinstate the Petitioner. It is an admission of weakness in Respondent's position.

Respondent states at page 6 of its Brief that AFR 39-22 "does not purport to establish a rigid rule applicable to all servicemen" but that the regulation leaves open the question of whether the serviceman might be given an honorable discharge or reinstated. In fact, the only version of AFR 39-22 which Respondent could have in mind is the inapplicable version of AFR 39-22 promulgated in 1959 since the 1953 regulation under which Petitioner was discharged provided either for discharge under less than honorable conditions, retention in the Air Force by waiver, or possible discharge under honorable conditions under *another* regulation.

This Court should take cognizance of the fact that the United States Navy still follows essentially the same regulation as was in effect for the Air Force at the time of the discharge of Petitioner. (Appendix A.) In that regulation the Navy states that "an individual shall be considered as having been convicted even though an appeal is pending or is subsequently filed". Thus, the problem

is a continuing one and will be so long as any military service follows the same policies as the Air Force did in the instant case. There is tremendous public interest in this case[2] because *inter alia*, Navy personnel are still being deprived of their constitutional rights pursuant to a comparable regulation.

Respondent states at page 2 of its Brief that Petitioner "advised the Air Force for the first time of his appeal and of the reversal of his conviction" on June 4, 1958. It was on June 4, 1958, that Petitioner first requested an honorable discharge, reinstatement and back pay through his attorney, Bernard J. Craig, Esq., of Kansas City, Missouri. (Appendix B) The question of timely notice of appeal to the Air Force was not raised in the briefs of either party in the Court of Claims.

Petitioner has attached to this brief an affidavit from Amos T. Hall, Esq. of Tulsa, Oklahoma, who was Petitioner's attorney during the proceedings in Jackson County, Oklahoma. (Appendix C) In Mr. Hall's affidavit of December 1, 1961, he states that "On or about November 19, 1956, he contacted the Office of the Judge Advocate of the Altus Air Force Base at Altus, Oklahoma and advised them that he was going to file a motion for a new trial and take an appeal on behalf of William Jackson, Jr." This was approximately 3 days after the conviction by the state district court and 5 days before Petitioner was discharged. Mr. Hall also states that he asked the Judge Advocate at Altus AFB to withhold Petitioner's discharge. If Respondent now contends that the issue of notice is important (which Petitioner does not concede), then certainly the notice afforded by Counsel for Petitioner at this early stage of the proceedings should have been sufficient to have placed the Air Force on notice of Petitioner's intent to appeal from the decision of the trial court.

Petitioner has never contended that the Air Force is

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[2] Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, U. S. Senate, pursuant to S. Res. 260, 87th Congress, 2nd Session, on Constitutional Rights of Military Personnel. (Committee Print, pp. 158 and 763)

under any contractual obligation. Petitioner contends only that the Air Force is bound by its own regulations. *Service* v. *Dulles*, 354 U.S. 363 (1957). The Air Force elected to proceed pursuant to AFR 39-22 and not another regulation. As such it is bound by that regulation. AFR 39-22 provided that Petitioner could only be discharged for conviction of a felony. That conviction was reversed and vacated because Petitioner's constitutional right to counsel was denied him. Therefore, Petitioner's discharge should have been modified to reflect an honorable discharge for the period he was out of the Air Force and he should also have been reinstated. At that time, the Air Force might have proceeded to discharge him pursuant to another regulation but this procedure it did not follow. Respondent has cited no regulation that might have been applicable.

To modify the type of discharge at this late date without affording the Petitioner the other relief to which he is entitled makes a mockery of the Air Force discharge procedures pursuant to this regulation. It is a poorly disguised attempt to avoid the type of issue raised in *Harmon* v. *Brucker*, 355 U.S. 579 (1958), and to keep this entire matter from being considered on the merits by this Honorable Court. Petitioner has been stigmatized for six years, being deprived of veteran benefits and suffering loss of job opportunities, wages and other losses. These efforts of Respondent are doubtless similar to the type of legerdemain which caused Lord Chief Justice Mansfield to opine, "It seems fairly obvious that the quest was not for truth but for victory." quoted in *U.S.* v. *Otley*, 34 F. Supp 182, 188 (D. C., Ore. 1940).

Respectfully submitted,

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APPENDIX A

BUREAU OF NAVAL PERSONNEL MANUAL
PART C

C-10312. *Discharge of Enlisted Personnel by Reason of Misconduct*

(1) . . .

(2) The Chief of Naval Personnel may direct the discharge of an enlisted person for misconduct in any of the following cases:

(a) Conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of one year; or which involves moral turpitude; or where the offender is adjudged a juvenile delinquent, wayward minor or youthful offender as a result of an offense involving moral turpitude. If the offense is not listed in the MCM Table of Maximum Punishments or is not closely related to an offense listed therein, the maximum punishments authorized by the U.S. Code or the District of Columbia Code, whichever is lesser, applies. For the purpose of this subparagraph only, an individual shall be considered as having been convicted even though an appeal is pending or is subsequently filed.

APPENDIX B

June 4, 1958

United States Air Force
Altus Air Force Base
Altus, Oklahoma

Attention: Commanding General
Re: William Jackson, Jr. AF 18[illegible]884 622 A/1C(P)

Honorable Sir:

The above was given a discharge under other than honorable conditions, DDForm 258AF, on November 24, 1956, by reason of conviction of Civil Court AFR 39-22(ADN-284).

Subsequently this case was reviewed by the Supreme Court of the State of Oklahoma and the conviction set aside and the case remanded to the District Court for a new trial. Thereafter the case against the above was dismissed for the reason that the facts and evidence were not sufficient to prove the defendant guilty and did not form a sufficient basis for a conviction.

Mr. Jackson now desires to make application for a revocation of his discharge and for reinstatement in the Air Force with back pay to be allowed him since the date of his discharge.

This letter is being directed to you as the discharge originated from your command, and I would appreciate your forwarding any documents necessary for Mr. Jackson to sign and file with you to petition for a revocation of the discharge and reinstatement in the Air Force with back pay.

Very truly yours,

BERNARD D. CRAIG

BDC:fb

APPENDIX C

AFFIDAVIT

STATE OF OKLAHOMA }
} ss
COUNTY OF TULSA }

Amos T. Hall, of lawful age, after being duly sworn on his oath, states that he is an attorney at law, licensed to practice in the State of Oklahoma, with offices at 121 North Greenwood in the City of Tulsa, Oklahoma; that he was attorney for William Jackson, Jr. at the time William Jackson, Jr. was discharged from the United States Air Force on or about November 24, 1956, under less than honorable conditions and given an undesirable discharge certificate for the reason that said William Jackson, Jr. had been convicted by a civil court of the crime of rape; that this affiant appealed said case to the Court of Criminal Appeals of the State of Oklahoma, which resulted in the conviction being reversed and vacated for the reason that Williams Jackson, Jr. was unconstitutionally deprived of his right of counsel at the time of trial, which case was reported as *Jackson* v. *State*, 316 P. 2d 213; that at the time the trial or purported trial of William Jackson, Jr., took place in the District Court of Jackson County, Oklahoma, the case had been set for trial on November 19, 1956, but for some reason unknown to this affiant, the said William Jackson, Jr. was brought before the court prior thereto on November 16, 1956, without this affiant being present, and said William Jackson, Jr. was found guilty and sentenced to five years in the penitentiary; that when this affiant did arrive in Altus, Oklahoma, in the District Court of Jackson County, Oklahoma, and learned of what had taken place, he immediately decided to file a motion for new trial, and at that time on or about November 19, 1956, he contacted the office of the Judge Advocate of the Altus Air Force Base at Altus, Oklahoma, and advised them that he was

going to file a motion for new trial and take an appeal on behalf of William Jackson, Jr., and upon being advised that William Jackson, Jr. was going to be discharged, he asked them to withhold discharging William Jackson, Jr. for the reason that he was going to file this motion for new trial and take this appeal, if necessary; that this affiant does not recall the name or names of the persons he talked to at the office of the Judge Advocate at the Altus Air Force Base at Altus, Oklahoma, but he recalls distinctly that he did contact them and did talk to one or more men in that office and stated that he was going to file a motion for new trial and take an appeal for William Jackson, Jr. and asked them to hold up on any contemplated discharge of William Jackson, Jr. until after ruling had been obtained on the motion for new trial or, if it were overruled, on the appeal which he told them was going to be filed; that the facts set forth in this affidavit are true and correct to the best knowledge, information and belief of this affiant.

Dated at Tulsa, Oklahoma this 1st day of December, 1961.

(signed) AMOS T. HALL
Affiant

Subscribed and sworn to before me this 1st day of December, 1961.

(signed) ODESSA L. WOODS
Notary Public

My Commission Expires: Sept. 23, 1962.